Supreme Court, U. S.
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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1513

UNITED STATES OF AMERICA,

Appellant

—*v.*—

PATRICIA ILENE CLARK, GUARDIAN FOR SHAWN D. CLARK AND TRICIA D. CLARK

ON APPEAL FROM THE UNITED STATES COURT OF CLAIMS

JURISDICTIONAL STATEMENT FILED APRIL 4, 1979
CONSIDERATION OF JURISDICTION POSTPONED MAY 21, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1513

UNITED STATES OF AMERICA,

Appellant

—*v.*—

PATRICIA ILENE CLARK, GUARDIAN FOR
SHAWN D. CLARK AND TRICIA D. CLARK

ON APPEAL FROM THE UNITED STATES COURT OF CLAIMS

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DOCKET ENTRIES

DATE	PROCEEDINGS
Jul 9 1976	Filing fee of $10 paid by plaintiffs.
Jul 15 1976	Notice of reference to Trial Judge Harry E. Wood filed. Copy to parties.
Sep 7 1976	Defendant's answer to the petition filed. Copies (5) to atty.
Sep 7 1976	Defendant's motion for summons to third party (George Isaacson) filed Copies (2) to atty. ALLOWED SEP 23 1976, and summons issued and delivered this day to defendant's attorney for service.
Sep 23 1976	Defendant's contingent cross claim against third party filed. Copies (5) to atty.
Oct 22 1976	Return of U. S. Marshal showing service of summons on George Isaacson on October 8, 1976. Notice to parties.
Feb 10 1977	Plaintiffs' motion for summary judgment filed. Copies (5) to deft.
Mar 11 1977	Defendant's motion to suspend further proceedings (pendings outcome of No. 312-74) filed. Copies (2) to atty. ALLOWED MAR 25 1977.
Jul 7 1977	Plaintiffs' motion for entry of judgment on their motion for summary judgment filed. Copies (2) deft. SEP 2 1977 Defendant is granted 30 days from this date from which to respond to plaintiffs' motion for summary judgment and upon the completion of briefing the case will be referred to an appropriate motion panel.
Jul 15 1977	Defendant's motion for extension of time (to August 17, 1977) to respond to motion for entry of judgment filed. Copies (2) to atty. ALLOWED JULY 27 1977.
Jul 28 1977	Plaintiff's opposition to defendant's motion for extension of time filed. Copies (2) to deft.

DATE	PROCEEDINGS

Aug 17 1977 Defendant's response to motion for entry of judgment filed. Copies (5) to atty.

Aug 26 1977 Plaintiffs' reply to defendant's response to plaintiffs' motion for entry of judgment filed. Copies (5) to deft.

Oct 3 1977 Defendant's response to plaintiffs' motion for summary judgment filed. Copies (5) to atty.

Oct 20 1977 Plaintiffs' reply in support of their motion for summary judgment filed. Copies (5) to deft.

Oct 20 1977 Submitted to the court on plaintiff's motion for summary judgment.

Jan 27 1978 Court entered order granting plaintiffs' motion for summary judgment and judgment is entered for plaintiffs with the case remanded to the Trial Division for further proceedings pursuant to Rule 131(c) in accordance with the order. Copy to parties.

Feb 9 1978 Defendant's motion for extension of time (to February 25, 1978) to file motion for rehearing filed. Copies (2) to atty. ALLOWED FEB 17 1978.

Feb 27 1978 Defendant's motion for extension of time (to March 29, 1978) to file motion for rehearing filed. Copies (2) to atty. ALLOWED MAR 17 1978.

Aug 11 1978 Stipulation for the entry of judgment filed by plaintiff. Copies (2) to deft.

Aug 14 1978 Defendant's contingent motion for judgment against third party filed. Copies (2) to atty and George Isaacson.

Nov 6 1978 Court filed order that defendant pay Patricia Ilene Clark, in her capacity as legal guardian, on behalf of Shawn Douglas Clark, the amount of $7,081.33 and, on behalf of Tricia Deanne Clark, the amount of $7,081.33 such amounts being those due and owing up to June 30, 1978; that Shawn Douglas Clark and Tricia Deanne Clark

DATE	PROCEEDINGS

be placed on the appropriate Civil Service Commission annuity rolls for continued payments of the children's survivor annuity pursuant to 5 U.S.C. § 8341(e), from June 30, 1978 to the expiration of their eligibility; and, that judgment be entered in favor of the U.S. against George G. Isaacson in the amount of $7,755.12. Copy to deft, pltf and George Isaacson.

Nov 6 1978 Certified copy of court's order forwarded to Civil Service Commission.

Nov 7 1978 Attested transcript of judgment delivered to attorney of record for plaintiff Edward L. Merrigan By Renee LeBel.

Dec 5 1978 Notice of appeal to the Supreme Court filed by deft. Copy to atty and to Isaacson.

Dec 6 1978 Defendant's motion for correction of clerical error filed. Copies (2) to atty and one to Isaacson. SEE ORDER OF DEC 8, 1978.

Dec 8 1978 Court entered order granting defendant's motion, filed December 6, 1978, for correction of clerical error and correcting the order of November 6, 1978, to read George Isaacson wherever the name George G. Isaacson appears therein. Copy to parties.

Apr 6 1979 Notice of filing in the Supreme Court of an Appeal on April 4, 1979, No. 78-1513 October Term, 1978 filed.

May 24 1979 Order of the Supreme Court, dated May 21, 1979, postponing further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits filed. See letter in file.

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
Washington, D.C. 20415

DECISION

IN THE MATTER OF

GEORGE G. ISSACSON

CSF 1 007 211

TYPE CASE: *DEATH BENEFITS*

BEFORE: Zwirn, Staiman and Jeffries,
Board Members.

INTRODUCTION

Patricia Clark, through her attorney, is appealing the decision of the Commission's Bureau of Retirement, Insurance, and Occupational Health that the children for whom she is legal guardian, Shawn Douglas and Tricia Deanne Clark, did not live with George G. Isaacson in a parent-child relationship and therefore are ineligible to receive a survivor annuity as the natural children of Mr. Issacson.

STATEMENT OF THE CASE

Mr. Issacson was employed by the Veteran's Administration Center, Fort Harrison, Montana, at the time of his death on August 17, 1974. Applications for death benefits have been filed by Mr. George Isaacson, who is the son [sic] and also the designated beneficiary of the decedent; and by Ms. Patricia Clark, on behalf of his natural children, Shawn Douglas and Tricia Deanne Clark. By decision dated September 27, 1974, BRIOH dismissed Ms. Clark's claim on the ground that S.D. and T.D. Clark did not qualify for a survivor annuity since they did not live with the decedent in a regular parent-child relationship. The Bureau determined that the death benefit due is a lump sum payment, and has made payment to Mr. Isaacson, the designated beneficiary.

REPRESENTATIONS TO THE BOARD

In the appeal from the decision of the Bureau of Retirement, Insurance, and Occupational Health, it is contended that S.D. Clark and T.D. Clark were legitimated, not illegitimate children, and therefore "entitled to the survivor's annuity they claim under the provisions of 5 USC 8341 which direct that such annuity is payable to 'an unmarried child under 18 years of age', without the need for further showing (applicable to illegitimate children only) that said children were 'recognized' and that as illegitimate children, they physically lived with the employee in a regular parent-child relationship."

Alternatively, it is submitted that in the event the Board finds it appropriate to consider the children as illegitimate, they would still be entitled to a survivor annuity "because the available evidence shows and will show that said children, born to decedent three years apart by the same mother, were decedent's 'recognized natural children' who did 'live with the employee . . . in a regular parent-child relationship' within the sense, spirit and meaning of 5 U.S.C. 8341(a)(3)(A)."

The appellants specifically requested:

(i) that they be afforded the right to file further evidence in support of this appeal in the form of affidavits or other written proof;

(ii) that they be afforded a hearing before the Board before a decision is rendered;

(iii) that they be afforded the right to file a brief or memorandum with reference to the applicable law;

(iv) that they be afforded the right to establish herein that, if appellant children are denied relief in this case, the Civil Service Retirement Law, thus applied, is unconstitutional.

By letter dated February 18, 1974, the appellants were requested to supply the Board with affidavits from at least two disinterested parties stating that the decedent lived with S.D. and T.D. Clark in a regular parent-child

relationship, and were invited to file a brief or memorandum of law with reference to the law applicable to this case. The appellants were also advised that the appeals procedure with regard to eligibility for Civil Service retirement benefits does not provide for a hearing.

In response to the Board's letter, the appellants submitted three affidavits, in which there was discussed the decedent's and Ms. Clark's relationship, the conduct of the decedent toward the Clark children, and the basis for the affiants' knowledge of these matters. In addition, the contention was reiterated that the children had been legitimated by a formal decree entered June 2, 1972, by the District Court for the First Judicial District of Montana, Broadwater County, in a paternity case entitled *Clark* v. *Isaacson* (No. 5626), wherein the Court found that George Gerald Isaacson was the father of Shawn Douglas Clark and Tricia Deanne Clark, and that Patricia Clark was their mother, and ordered Mr. Isaacson to support the two children and make them the beneficiaries of his Federal Employees Group Life Insurance.

Finally, there has been submitted an affidavit of the designated beneficiary of the deceased, offering to return the lump sum payment he received if a determination is made by the Commission to provide the claimant children with the requested monthly survivor benefits.

ANALYSIS AND FINDINGS

The Appeals Review Board has reviewed the entire record in the case and has fully considered appellants' representations; however, the Board finds no basis to reverse the Bureau's decision.

Under the definition of "child" contained in 5 U.S.C. 8341(a)(3) and amplified in FPM Supplement 831-1, subchapter 17(2)(J), acvknowledged illegitimate children may be entitled to a survivor annuity if, among other requirements, they *lived with* the employee in a regular parent-child relationship. In the administration of the Civil Service Retirement System, "living with" has been construed as meaning that the child and parent

shared a common roof under conditions with indicated more than a mere coincidence of residence. While periodic or temporary separation does not bar "living with", the circumstances must indicate that the child and parent have shared and again expect to share a common roof or resume a common residence when conditions permit.

The Commission has consistently held that the "living with" requirement is not met when the parent maintains a residence different from the child or if the parent and child are not living together at the time of the employee's death. The use of the language "had lived" in the instructional material in the FPM is not viewed as meaning that the existence of a past parent-child relationship qualifies the child for a survivor annuity. The provision of the retirement law which defines the term "child" for survivor annuity purposes also speaks in the past tense, but this is understandable since the death of the employee terminates the relationship. However, it is the Commission's position that the circumstances in a particular case must be such as to establish that the "lived in a parent-child relationship" existed to the time of death of the employee. There is no such showing in this case.

The certificate of death for George Gerald Isaacson indicates that his date of death was August 17, 1974. The affidavits giving detailed information concerning his alleged parent-child relationship with the Clark children all stated that the alleged relationship existed from either 1965 or 1966 until 1971. Indeed, the formal decree of the Montana court, in which decedent was ordered to support the Clark children, is dated June 2, 1972. Under the circumstances, the Board must conclude that the decedent did not live in a parent-child relationship with the Clark children from at least 1972 until the date of his death in 1974. The Board therefore concurs with the BRIOH decision that a regular parent-child relationship did not exist between the deceased, and Shawn and Tricia Clark.

Appellant's argument that "the children were formally legitimated by decree of the Montana Court" is without merit.

Under the Civil Service Retirement law, the determination of familial relationships is left to the laws of the individual states. *See Yarbrough* v. *United States*, 341 F.2d (Ct. Cl. 1965) [sic]. Thus, whether a child is legitimate or natural (illegitimate) child [sic] must be determined by looking to the law of the state of the child's domicile. In this case, the law of the State of Montana must be applied.

In Montana the father of a child born out of wedlock is liable "for the reasonable expense of the mother's pregnancy, and confinement and for the education, necessary support and funeral expenses of [his] child." Rev. Codes of Montana, section 93-2901-1 (Repl. Vol. 7, 1947 ed.) The fact of paternity and the obligation of support which flows from such a determination may be adjudged and enforced by a State of Montana district court. Rev. Codes of Montana, sections 93-2901-2,-5 (Repl. Vol 7, 1947 ed.). However, chapter 2901, Support of Children Born Out of Wedlock (located at page 1057 *et seq*, Repl. Vol. 7, 1947 ed., Rev. Codes of Montana), does not provide for the legitimization of children born out of wedlock through a finding of paternity. Appellant's contention in paragraph 5 of the appeal brief that a finding of paternity legitimates the children born of an out-of wedlock relationship has no basis in Montana law.

Section 93-2901-1, supra, provides, in part, that "nothing herein contained shall affect the presumptions of legitimacy otherwise provided by statute." The only presumptions of the legitimacy of children in Montana are (1) that all children born in wedlock are legitimate and (2) that all children born within 10 months of the dissolution of a marriage are legitimate. Rev. Codes of Montana, sections 61-101, 102 (2nd Repl. Vol. 4, Part 1, 1947 ed.). Further, Montana law provides (1) that a child born out of wedlock acquires the status of a legitimate child if the parents intermarry and (2) that a child born of a void marriage or a marirage dissolved by divorce is legitimate. Rev. Codes of Montana, sections 61-123 (2nd Repl. Vol. 6, Part II, 1947 ed.) No marriage has been claimed in this case; therefore, none of

the sections of law noted above apply here. The Board has been unable to locate, and appellant fails to cite in the appeal brief, any other sections of law which confer legitimacy on children born out of wedlock.

The fact that an individual adjudged by a Montana Court to be the father of illegitimate children is required by court order to support the children and name them as beneficiaries of life insurance policies is not dispositive of the issue of whether the children are legitimate or illegitimate.

The order of support provided by appellant makes no reference to the legitimacy or illegitimacy of the children to be supported. No Montana statute we have found confers legitimacy on children in the position of appellant's children. Therefore, the Board must consider the appellant's children to be illegitimate.

The offer of the designated beneficiaries of the deceased Federal employee to return the lump-sum payment they received should the Commission determine that appellant's children are entitled to survivor annuities has no effect on this case. A lump-sum payment may be made to a designated beneficiary only when no annuity or survivor is payable. 5 U.S.C. 8342(e). Therefore, if it were determined that survivor annuities were payable in this case, payment of the lump-sum benefit would have been in error and the Commission would be required to collect the amount of the lump-sum payment made from the designated beneficiaries.

The Board notes appellants' argument that 5 U.S.C. 8341 is unconstitutional. However, until this provision of the retirement law is held unconstitutional by a court of competent jurisdiction, the Commission has no alternative but to continue its enforcement.

DECISION

In view of the foregoing analysis and findings, the Appeals Review Board hereby affirms the decision of the Bureau of Retirement, Insurance, and Occupational

Health. Civil Service regulations provide that the decision of the Board is final and there is no further right of administrative appeal.

For the Board:

/s/ Herman D. Staiman
HERMAN D. STAIMAN
Chairman

Jan. 7, 1976

IN THE
UNITED STATES COURT OF CLAIMS

No. 285-76

[Filed Jul. 9, 1976]

PATRICIA ILENE CLARK, Legal Guardian of SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK, minors, and SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK individually, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

PETITION

Plaintiffs, Patricia Ilene Clark, Legal Guardian of Shawn Douglas Clark and Tricia Deanne Clark, minors, and Shawn Douglas Clark and Tricia Deanne Clark, individually and for and on their own behalf, complaining of defendant herein, respectfully allege as follows:

1. Plaintiff Patricia Ilene Clark is a citizen of the United States, a resident of the State of Montana, and she is the mother and legal guardian of plaintiffs Shawn Douglas Clark, a minor child eight (8) years of age, and Tricia Deanne Clark, a minor child five (5) years of age, both of whom are citizens of the United States and residents of the State of Montana. Plaintiff Patricia Ilene Clark thus brings this action in her capacity as legal guardian for and on behalf of her said children, plaintiffs Shawn Douglas Clark and Tricia Deanne Clark. In the alternative, and to the extent they have any legal

standing to assert their own claims before this Court, plaintiffs Shawn Douglas Clark and Tricia Deanne Clark bring this action individually and for and in their own behalf against the defendant herein.

2. This Court's jurisdiction over this action is based on the provisions of Title 28 U.S.C. § 1491, this being a claim against the United States founded upon an Act of Congress, regulations of an executive department thereunder, and upon the Constitution of the United States.

3. Heretofore, and for a period of several years prior to his death on August 17, 1974, George G. Isaacson, the father of plaintiffs Shawn Douglas Clark and Tricia Deanne Clark, was a federal civil service employee of deefndant herein, employed by defendant's Veteran's Administration Center located at Fort Harrison, Montana.

4. When plaintiffs Shawn Douglas Clark and Tricia Deanne Clark were born respectively in 1968 and 1971, their father, the said George G. Isaacson, and their mother, plaintiff Patricia Ilene Clark, were not formally married. Nevertheless, their said parents regularly and openly cohabited as man and wife in the same dwelling place; they lived together with plaintiff children as mother and father from and after the children's respective births, and they regularly and openly acknowledged both children as their own without any contradition whatsoever.

5. Indeed, on June 2, 1972, approximately two years before the death of the said George G. Isaacson, a judgment was rendered by the District Court for the First Judicial District of Montana, County of Broadwater, in an action entitled *Patricia Ilene Clark* v. *George Gerald Isaacson*, copy of which is annexed hereto, made a part hereof and marked *Exhibit A*, wherein the Montana court specifically found and decreed:

> (i) "That the plaintiff Patricia Ilene Clark is the mother of Shawn Douglas Clark, who was born at St. John's Hospital, Helena, Montana, on April 13, 1968, and of Tricia Deanne Clark, who was born at St. Peter's Hospital, Helena, Montana, on January 28, 1971"; and

> (ii) "That the defendant, George Gerald Isaacson, is the father of Shawn Douglas Clark and Tricia Deanne Clark, above described."

6. Having made those findings and stated those conclusions, and having found further that the said George Gerald Isaacson was regularly employed by defendant's Veteran's Administration at Fort Harrison, Montana where he earned in excess of $12,000 per year, the Court ordered and decreed that George Gerald Isaacson provide monetary support for plaintiffs Shawn Douglas Clark and Tricia Deanne Clark, his children, as follows:

(a) He was ordered to pay, no later than June 1, 1972, the sum of $5,000 in settlement of all past support obligations to his said children;

(b) He was ordered to pay, commencing June 1, 1972, $60 per month to each of said children, or $120 per month for both, in future, continuing support payments, such monthly payments to continue until such time as each of the said children reached the age of majority;

(c) He was ordered, in addition, to make the said children prime beneficiaries on a New York Life Insurance Company policy and on a Federal Employees Group Life Insurance policy he held in force, and he was directed to submit such change of beneficiaries under said policies to the court for its approval.

7. Thereafter, and up to and including approximately the time of his sudden, accidental death in August, 1974 as aforesaid, the said George Gerald Isaacson fully and continuously complied with the aforementioned decree of the Montana court, and he regularly provided all support payments and other benefits to plaintiffs Shawn Douglas Clark and Tricia Deanne Clark as directed by the court's said judgment.

8. Accordingly, upon the death of the said George Gerald Isaacson in 1974 as aforesaid, his two children, plaintiffs Shawn Douglas Clark and Tricia Deanne Clark, made due and timely application to defendant's United States Civil Service Commission, Bureau of Retirement, Insurance and Occupational Health, for payment of any and all death benefits and/or survivor annuities payable

to children of deceased federal civil service employees such as the said Isaacson under and pursuant to the federal Civil Service Retirement statutes (5 U.S.C. 8301 et seq.).

9. On or about September 27, 1974, however, defendant's said United States Civil Service Commission, Bureau of Retirement, Insurance and Occupational Health, responded to said application stating "*No Benefits Are Payable*" for the asserted reason:

> "Under the Civil Service law, an illegitimate child does not qualify for survivor monthly benefits unless living in a parent-child relationship."

10. Plaintiffs thereupon appealed within the time prescribed by the applicable Civil Service Retirement Regulations and directions received from defendant's Civil Service Commission to the Commission's Appeals Review Board. After an inexplicable delay of almost a full year, said Board finally rendered a decision, copy of which is annexed hereto, made a part hereof and marked *Exhibit B*, wherein it affirmed the adverse ruling of the Bureau of Retirement, Insurance and Occupational Health and ruled that no death or survivor benefits are payable to plaintiffs under the Civil Service Retirement statutes. In explanation of its ruling, the Board stated:

> "Under the definition of "child" contained in 5 U.S.C. 8341(a)(3) and amplified in FPM Supplement 831-1, subchapter 17(2)(J), acknowledged illegitimate children may be entitled to a survivor annuity if, among other requirements, they *lived with* the employee in a regular parent-child relationship. In the administration of the Civil Service Retirement System, "living with" has been construed as meaning that the child and parent shared a common roof under conditions which indicated more than a mere coincidence of residence. While periodic or temporary separation does not bar "living with", the circumstances must indicate that the child and parent have shared and again expect to share a common roof or resume a common residence when conditions permit.

> "The Commission has consistently held that the "living with" requirement is not met when the parent maintains a residence different from the child or if the parent and child are not living together at the time of the employee's death. The use of the language "had lived" in the instructional material in the FPM is not viewed as meaning that the existence of a past parent-child relationship qualifies the child for a survivor annuity. The provision of the retirement law which defines the term "child" for survivor annuity purposes also speaks in the past tense, but this is understandable since the death of an employee terminates the relationship. However, it is the Commission's position that the circumstances in a particular case must be such as to establish that the "lived in a parent-child relationship" existed to the time of death of the employee. There is no such showing in this case.
>
> "The certificate of death for George Gerald Isaacson indicates that his date of death was August 17, 1974. The affidavits giving detailed information concerning his alleged parent-child relationship with the Clark children all stated that the alleged relationship existed from either 1965 or 1966 until 1971. Indeed, the formal decree of the Montana court, in which decedent was ordered to support the Clark children, is dated June 2, 1972. Under the circumstances, the Board must conclude that the decedent did not live in a parent-child relationship with the Clark children from at least 1972 until the date of his death in 1974. . . ."

11. In the course of its adverse ruling, *Exhibit B* herein, defendant's Civil Service Commission's Appeals Review Board stated that, in addition to plaintiffs herein, the father of the deceased George Gerald Isaacson, one George Isaacson, had also filed a claim for death benefits under the Civil Service Retirement laws as "the designated beneficiary of the decedent". The Board went on to state that since plaintiff minor children were ruled ineligible to collect the statutory death benefits, the Bu-

reau of Retirement, Insurance and Occupational Health had proceeded, on or about September 27, 1974 to make a "lump-sum settlement" with the decedent's father, Mr. Isaacson, and that the amount payable to Mr. Isaacson under the terms of said settlement had been paid.

However, before the Board rendered its adverse ruling, *Exhibit B* hereto, the decedent's father, Mr. Isaacson, caused an affidavit, copy of which is annexed hereto, made a part hereof and marked *Exhibit C*, to be filed with the Board which stated:

> "The undersigned George Isaacson, the designated beneficiary of George Gerald Isaacson as provided by Section 8342(c) of Title 5 U.S.C. has no objection to the award of monthly survivor benefits to Shawn Douglas Clark and Tricia Deanne Clark, and if such determination is made, the sum of Seven Thousand Seven Hundred and Fifty Five and 12/100 Dollars ($7,755.12) heretofore paid to the undersigned as designated beneficiary shall be returned to the United States Civil Service Commission, Bureau of Retirement, Insurance and Occupational Health."

But, in its aforementioned ruling, the Board nevertheless stated:

> "The offer of the designated beneficiaries (sic) of the deceased Federal employee to return the lump-sum payment they (sic) received should the Commission determine that appellant's children are entitled to survivor annuities has no effect on this case. A lump-sum payment may be made to a designated beneficiary only when no annuity or survivor is payable. 5 U.S.C. 8342(e). Therefore, if it were determined that survivor annuities were payable in this case, payment of the lump-sum benefit would have been in error and the Commission would be required to collect the amount of the lump-sum payment made from the designated beneficiaries (sic)."

12. Plaintiffs assert they are lawfully entitled to the death benefits or survivor annuities they seek herein under the provisions of the federal Civil Service Retirement statutes (5 U.S.C. 8301 et seq.); that the two minor plaintiffs herein, and each of them, did in truth and in fact live in a regular parent-child relationship with their deceased father, George Gerald Isaacson; that clearly, under and pursuant to the decree of the Montana court, *Exhibit A* hereto, the deceased George Gerald Isaacson was judicially adjudged and decreed to be their father and they, his children; that pursuant to the same decree, the deceased George Gerald Isaacson did, in truth and in fact, support them as his children up to approximately the time of his death, and otherwise in all respects openly and regularly recognized said minor plaintiffs to be his children within the letter, sense and spirit of Title 5 U.S.C. 8341 et seq. entitled "Survivor Annuities".

13. Plaintiffs assert further that the adverse rulings rendered by defendant's Civil Service Commission's Bureau of Retirement, Insurance and Occupational Health were in all respects erroneous, arbitrary, capricious and contrary to the preponderance of the evidence presented by the parties, and that same should be vacated and overruled by this Court.

14. Plaintiffs assert further that the aforementioned decree issued by the Montana court, *Exhibit A* hereto, had the absolute effect of legitimating both minor plaintiffs herein as the natural children of the deceased George Gerald Isaacson, and that under Montana law (*Revised Code of Montana, Section 91-404*) children thus legitimated by Court decree enjoy the same survivorship and inheritance rights and status, as a matter of law, as children born out of regular wedlock. Plaintiffs thus allege it was erroneous and improper for defendant's Appeals Review Board to rule:.

> "Appellant's contention . . . that a finding of paternity legitimates the children born of an out-of-wedlock relationship has no basis in Montana law. . . .
>
> "Therefore, the Board must consider the appellant's children to be illegitimate."

15. Plaintiffs assert, in addition, that the federal Civil Service Retirement laws (5 U.S.C. 8301 et seq.), and more specifically those portions thereof entitled "Survivor Annuities" (5 U.S.C. 8341 et seq.), as administered, applied and construed by defendant's Civil Service Commission, Bureau of Retirement, Insurance and Occupational Health, and by the Commission's Appeals Review Board, are violative of the Fifth Amendment to the Constitution of the United States in that they have operated to deprive the minor plaintiffs herein of their property without due process of law, and without any opportunity for a hearing at which they could confront and cross-examine their adversaries.

16. Plaintiffs assert further that the federal Civil Service Retirement laws (5 U.S.C. 8301 et seq.), and more specifically those portions thereof entitled "Survivor Annuities" (5 U.S.C. 8341 et seq.), as administered, applied and construed by defendant's Civil Service Commission, Bureau of Retirement, Insurance and Occupational Health, and by the Commission's Appeals Review Board, are violative of the Fifth Amendment to the Constitution of the United States in that they deny the minor plaintiffs to this action equal protection of the laws solely because said plaintiffs are allegedly "illegitimate children" who were not living with their Court-decreed father under "a common roof" at the time of his death in an automobile accident. Said statute, so administered, applied, and construed, grossly and insidiously discriminates against the minor plaintiffs herein while "legitimate children" and "adopted children" who have never lived under a common roof with their deceased fathers, or who have not lived with him for several years are awarded survivor annuities upon his death without pause or question.

Said statute, so administered, applied and construed, likewise grossly and insidiously discriminates against the minor plaintiffs herein while other "step children" or "illegitimate children" never possessed of a court decree such as the Montana judgment in this action, *Exhibit A* hereto, are readily accorded full and complete "survivor annuities" under said statute solely because they

are able to convince defendant's Commission, Bureau, or Board that they were living under "a common roof" with their "stepfather" or "illegitimate father" at or about the precise time of his death.

17. Plaintiffs assert finally, therefore, that the two minor plaintiffs herein are lawfully entitled to the survivor annuities and other death benefits they claim herein, and that judgment in their favor should be granted as a matter of law and right.

Wherefore, plaintiffs pray that judgment be entered herein, in the alternative, in favor of plaintiff Patricia Ilene Clark in her capacity as Legal Guardian and mother of the two minor plaintiffs herein, or in favor of the two minor plaintiffs Shawn Douglas Clark and Tricia Deanne Clark, and each of them, against the United States ordering and directing defendant to pay all death benefits and survivor annuities owed to the minor plaintiffs herein as the lawful survivors of George Gerald Isaacson, deceased, under the Civil Service Retirement laws (5 U.S.C. 8301 et seq.), and that all amounts presently owed from and since the time of his death on August 17, 1974 be computed and paid without further delay, and that such other and further relief be granted as may be just, lawful and proper.

/s/ Edward L. Merrigan
EDWARD L. MERRIGAN
SMATHERS, MERRIGAN & HERLONG
Attorneys for Plaintiffs
888 17th Street, N.W.
Washington, D.C. 20006

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

PATRICIA ILENE CLARK, ETC., PLAINTIFF

v.

UNITED STATES, DEFENDANT

DEFENDANT'S ANSWER

SEP 7 1976

For its answer to the petition herein, defendant admits, denies, and alleges as follows:

1. Denies the allegations contained in paragraph 1 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

2. The allegations contained in paragraph 2 constitute conclusions of law requiring no response; however, to the extent that they may be deemed to constitute allegations of material fact they are denied.

3. Denies, except admits that prior to his death on August 17, 1974, George G. Isaacson had been a federal civil service employee, employed by the Veteran's Administration at Fort Harrison, Montana.

4. Denies the allegations contained in the first sentence of paragraph 4, except admits that George G. Isaacson and Patricia Ilene Clark were never married. Denies the remainder of paragraph 4 for lack of knowledge or information sufficient to form a belief as to the truth thereof. Answering further, defendant avers that during the period in question, George G. Isaacson continuously maintained a residence separate and apart from the instant plaintiffs.

5-6. Denies to the extent that it is borne out by the judgment, which is the best evidence of its contents.

7. Denies the allegations contained in paragraph 7 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

8-9. Admits the allegations contained in paragraphs 8 and 9.

10. Admits that plaintiffs filed a timely appeal to the Civil Service Commission's Appeals Review Board. Denies the remainder of paragraph 10 except to the extent borne out by the Appeals Review Board's decision, which is the best evidence of its contents.

11. Admits the allegations contained in paragraph 11.

12-17. Denies the allegations contained in paragraphs 12-17, inclusive.

18. Denies each and every allegation not heretofore admitted, denied, or otherwise qualified.

WHEREFORE, defendant prays that the petition herein be dismissed and that defendant be granted such other and further relief as may be just and proper.

REX E. LEE
Assistant Attorney General
Civil Division

DONNIE HOOVER
Attorney, Civil Division
Department of Justice

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

Filed Feb. 10, 1977

PATRICIA ILENE CLARK, LEGAL GUARDIAN OF SHAWN DOUGLAS CLARK AND TRICIA DEANNE CLARK, MINORS, AND SHAWN DOUGLAS CLARK AND TRICIA DEANNE CLARK INDIVIDUALLY, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs hereby move pursuant to the provisions of Rule 101 of the Court of Claims Rules, for summary judgment herein on the ground there is no genuine issue as to any material fact and they are entitled to judgment as a matter of law. In support of their motion, plaintiffs rely on the pleadings herein and upon the brief filed herewith.

Wherefore, plaintiffs pray that this motion be granted and that judgment be entered in their favor against defendant ordering and directing defendant to pay all death benefits and survivor annuities owed to the minor plaintiffs herein as the lawful survivors of George Gerald Isaacson, deceased, under the Civil Service Retirement laws (5 U.S.C. 8301 et seq.), and that all amounts presently owed from and since the time of his death on August 17, 1964 be computed and paid without further delay.

/s/ Edward L. Merrigan
EDWARD L. MERRIGAN
Attorney for Plaintiffs
6000 Connecticut Ave., N.W.
Washington, D. C. 20015

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

PATRICIA ILENE CLARK, ET AL., PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Oct. 3, 1977

Defendant submits the following brief in response to plaintiffs' motion for summary judgment filed February 10, 1977, in the above-captioned case. While defendant concedes that *Gentry* v. *United States*, Ct. Cl. No. 312-74 (decided November 17, 1976), is controlling as to the question of constitutionality, the instant case should nevertheless be remanded to the Civil Service Commission for the initial determination of liability and damages.

Argument

In their motion for summary judgment, the plaintiffs rely primarily upon this Court's decision in *Gentry* v. *United States*, Ct. Cl. No. 312-74 (decided November 17, 1976), and the Supreme Court's decision in *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974). In *Gentry*, *supra*, this Court declared the live-with provision of 5 U.S.C. 8341 (a) (3) (A) (ii) unconstitutional.[1]

In view of this Court's decision in *Gentry*, *supra*, and the doctrine of *stare decisis*, defendant hereby concedes that said decision is controlling as to the question of constitutionality in the instant case. However, it should be noted that this concession is in no way to be con-

[1] This is the essence of the *Gentry* decision, notwithstanding the fact that the Court dismissed that portion of plaintiffs petition asking for a declaratory judgment of unconstitutionality of the live-with provision of the statute. (See *Gentry*, slip op. p. 20).

strued as a waiver of defendant's right to seek a writ of certiorari in either *Gentry, supra*, or the instant case.

With respect to the questions of liability and damages in the case at bar, defendant submits that this case should be remanded to the Civil Service Commission for its initial determination of these matters. As this Court recognized in *Gentry, supra*:

> The CSC, under 5 U.S.C. § 8347(b) and (c) (1970), is the sole, and final arbiter of 'all claims' such as factual questions of dependency, parentage, and recognition arising under the annuity statute.
>
> * * * *
>
> Here, . . . the statute commits basic factual determinations on which claims turn under the annuity statute to the CSC, and to it alone . . . . It would be improper to allow plaintiff to bypass this administrative procedure simply by the institution of suit.

Slip Op. at page 19.

Accordingly the instant case should be remanded to the CSC so that the Commission can carry out its statutory mandate as interpreted by this Court in *Gentry, supra*.

Conclusion

For the foregoing reasons, defendant respectfully requests that the instant case be remanded to the Civil Service Commission for the purpose of applying the legal determinations relative to the standards or guidelines established by the Commission in *Gentry, supra*, and of making the factual determination as to whether plaintiffs meet such criteria.

Respectfully submitted,

BARBARA ALLEN BABCOCK
Assistant Attorney General
Civil Division

DONNIE HOOVER
Attorney, Civil Division
Department of Justice

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

Jan. 27, 1978

SHAWN D. CLARK and TRICIA D. CLARK, Minors, by Patricia I. Clark, their Legal Guardian

v.

THE UNITED STATES

Before DAVIS, *Judge*, Presiding, KUNZIG, and BENNET, *Judges*.

ORDER

This is a suit, brought on behalf of Shawn D. Clark and Tricia D. Clark (minor children, plaintiffs), for recovery of death benefits and survivor annuities allegedly due them pursuant to the Civil Service Retirement Act of 1930, as amended. 5 U.S.C. §§ 8331-48 (1970). Upon the death of their father, George G. Isaacson, an employee of the Veteran's Administration, the children made timely application to the Civil Service Commission, Bureau of Retirement, Insurance and Occupational Health (BRIOH) for payment of benefits under 5 U.S.C. § 8341 (e). BRIOH denied their claim pointing to statutory language which required illegitimate children to have lived with their father in a "regular parent-child relationship" in order to qualify for survivor annuities.[1]

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[1] 5 U.S.C. § 8341 provides, in pertinent part, as follows:

§ 8341. *Survivor annuities.*

(a) For the purpose of this section—

(3) "child" means—

[Footnote continued on page 26]

After the Civil Service Commission (CSC) Appeals Board affirmed the BRIOH determination,[2] the plaintiffs filed suit in this court. The matter is now before us on plaintiffs' motion for summary judgment.[3]

Subsequent to the filing of the instant case, this court has had occasion to deal with the precise statutory provisions now before us. In *Gentry* v. *United States*, 212 Ct.Cl. 1, 546 F.2d 343 (1976),[4] we held a portion of 5 U.S.C. § 8341 to be unconstitutional insofar as it discriminates between legitimate and illegitimate children solely on the basis of their status at birth. Since the Government now quite properly concedes that *Gentry*, *supra*, is dispositive of the case now before us, the only issue to decide is whether we should remand to the CSC as we did in *Gentry*.

Despite the Government's request that we remand to the CSC for further factual determination, it is not appropriate to do so in this case. In *Gentry*, it was necessary to determine "whether plaintiff is in fact the child

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[1] [Continued]

> (A) * * * (ii) a stepchild or recognized natural child who lived with the employee or Member in a regular parent-child relationship;

[2] The CSC held that there was no "regular parent-child relationship" at the time of the father's death notwithstanding the following facts: George Isaacson was the father of both children, he had in fact lived with them and their mother under the same roof for some six years, he had thereafter been subject to a court decree to pay child support, and he had continued to provide child support until the time of his death.

[3] This court is aware of defendant's assertion that, after finding the children not eligible, CSC made an award of $7,755.12 to the father of George G. Isaacson. In 1976, defendant filed a contingent third party cross-motion against the father, but defendant has not followed up on its third party cross-motion, and it is not before the court on this motion for summary judgment.

[4] The case is also reported at 212 Ct.Cl. 27, 551 F.2d 852 (1977) (Order denying Defendant's Motion for Rehearing). Defendant, perhaps because of the compelling factual circumstances present in the case now before us (*see* note 2, *supra*), has apparently abandoned its contention (which it made on motion for rehearing in *Gentry*) that some determination as to "degree of dependency" might be necessary.

of the deceased annuitant and whether the latter recognized and supported him as such." *Gentry*, *supra* at 355. Here, on the other hand, there is no dispute over the facts of parentage, recognition, and support. Indeed, a prior, valid, judgment is conclusive on these points. *Clark* v. *Isaacson*, No. 5625 (Dist. Ct., 1st Dist. of Mont., Broadwater County, June 2, 1972). As there are thus no factual determinations to be made bearing on the right to recover, a remand to the CSC would serve no purpose.

In summary, on the uncontested facts of parentage, recognition, and support, plaintiffs have shown that they have a right to recover the benefits provided by 5 U.S.C. § 8341(e). Because this court has previously held a portion of 5 U.S.C. § 8341 to be unconstitutional insofar as it discriminates between legitimate and illegitimate children solely on the basis of their status at birth, and since there are no factual issues which require CSC determination, we hold that plaintiffs are entitled to recover the annuity provided by the statute.

Accordingly, IT IS HEREBY ORDERED, upon consideration of the pleadings and exhibits, without oral argument, that plaintiffs' motion for summary judgment is granted. Judgment is therefore entered for plaintiffs, and the cause is remanded to the Trial Division for further proceedings under Rule 131(c) to determine the amount to be awarded plaintiffs, consistent with this opinion.

BY THE COURT

Jan. 27, 1978

/s/ Oscar H. Davis
OSCAR H. DAVIS
Judge, Presiding

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

[Filed Aug. 11, 1978, Court of Claims]

PATRICIA ILENE CLARK, ET AL., PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

STIPULATION FOR THE ENTRY OF JUDGMENT

For the purpose of enabling the Court to render final judgment in this case, it is hereby stipulated by and between the attorneys for the parties hereto as follows:

1. By Order dated January 27, 1978, the Court of Claims granted the plaintiffs' motion for summary judgment, entered judgment on the issue of liability for plaintiffs, and remanded the case to the Trial Judge for further proceedings under Rule 131(c) to determine the amount to be awarded consistent with said order and judgment on liability of January 27, 1978.

2. Accordingly, it is hereby stipulated that the amount to be awarded to plaintiff Patricia Ilene Clark on behalf of Shawn Douglas Clark consistent with the order and judgment on liability of the Court herein dated January 27, 1978, is $7,081.33.

3. It is further stipulated that the amount to be awarded to plaintiff Patricia Ilene Clark on behalf of Tricia Deanne Clark consistent with the order and judgment on liability of the Court herein dated January 27, 1978, is $7,081.33.

4. It is further stipulated that the amounts reflected in Paragraphs 2 and 3 above are computed up to June 30, 1978, and that Shawn Douglas Clark and Tricia Deanne Clark shall be placed on the appropriate Civil Service annuity rolls for continued payments of the children's survivor annuity pursuant to 5 U.S.C. § 8341

(e), from June 30, 1978 and until their eligibility expires.

5. This stipulation is made for the purpose of enabling the Court to enter a final judgment in favor of the plaintiff, Patricia Ilene Clark, in her capacity as legal guardian for Shawn Douglas Clark and Tricia Deanne Clark, in the total amount of $14,162.66, provided the Court accepts this stipulation in its entirety. However, in the event this stipulation is rejected in whole or in part by the Court, it is agreed that this entire stipulation shall be void and of no effect whatsoever.

Respectfully submitted,

/s/ Edward L. Merrigan
EDWARD L. MERRIGAN
Attorney for Plaintiffs

/s/ Barbara Allen Babcock
BARBARA ALLEN BABCOCK
Assistant Attorney General
Civil Division

/s/ Donnie Hoover
DONNIE HOOVER
Attorney, Civil Division
Department of Justice

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

November 6, 1978

PATRICIA ILENE CLARK, LEGAL GUARDIAN OF SHAWN DOUGLAS CLARK AND TRICIA DEANNE CLARK, MINORS, AND SHAWN DOUGLAS CLARK AND TRICIA DEANNE CLARK INDIVIDUALLY, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

and

GEORGE G. ISAACSON, THIRD-PARTY DEFENDANT

Before FRIEDMAN, *Chief Judge*, BENNETT and SMITH, *Judges*.

ORDER

This suit was brought on behalf of two minor children for recovery of death benefits and survivor annuities due them pursuant to 5 U.S.C. §§ 8331-8348 (1970). We granted plaintiffs' motion for summary judgment as to the liability question and remanded the case to the trial division for further proceedings under Rule 131(c) to determine the amount to be awarded plaintiffs. *Clark* v. *United States*, Ct. Cl. No. 285-76 (order, Jan. 27, 1978). The parties, on August 11, 1978, submitted a stipulation for the entry of judgment which we have reviewed and accept in its entirety.

On September 7, 1976, defendant moved the court, pursuant to Rule 41(a)(2), to summon George G. Isaacson as a contingent debtor in this case. By order dated September 23, 1976, the court allowed defendant's motion, issued said summons and filed defendant's contingent

cross-claim against the third party. The third party was personally served the summons by a U.S. Marshal and has failed to respond to defendant's claim.

The basis of defendant's contingent cross-claim was that defendant had made payment of $7,755.12 to the third party upon the finding that the above-named plaintiffs were not entitled to benefits. Upon our finding that the plaintiffs herein were entitled to the benefits, it is concluded that the third party was not entitled to the payment. Therefore, we grant judgment *pro confesso* under Rule 41(f) in favor of defendant against the third party.

IT IS THEREFORE ORDERED that defendant pay Patricia Ilene Clark, in her capacity as legal guardian, on behalf of Shawn Douglas Clark, the amount of $7,081.33 and, on behalf of Tricia Deanne Clark, the amount of $7,081.33, such amounts being those due and owing up to June 30, 1978.

IT IS FURTHER ORDERED that Shawn Douglas Clark and Tricia Deanne Clark be placed on the appropriate Civil Service Commission annuity rolls for continued payments of the children's survivor annuity, pursuant to 5 U.S.C. § 8341(e), from June 30, 1978, to the expiration of their eligibility.

IT IS FURTHER ORDERED that judgment be entered in favor of the United States against George G. Isaacson in the amount of $7,755.12.

BY THE COURT

/s/ Daniel M. Friedman
DANIEL M. FRIEDMAN
Chief Judge

SUPREME COURT OF THE UNITED STATES

No. 78-1513

UNITED STATES, APPELLANT,

v.

PATRICIA ILENE CLARK, GUARDIAN FOR
SHAWN D. CLARK AND TRICIA D. CLARK

APPEAL from the United States Court of Claims.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

May 21, 1979

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